No. 12212

In the United States Court of Appeals for the Ninth Circuit

SHOSO NII, *appellant*

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII

BRIEF FOR APPELLEE

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OPINION BELOW

The opinion of the District Court (R. 153–157) is reported at 81 F. Supp. 1003.

JURISDICTION

The jurisdiction of the United States District Court for the Territory of Hawaii was founded upon Sections 9 (a) and 17 of the Trading With the Enemy Act, 40 Stat. 411, as amended (50 U. S. C. App. §§ 9 (a), 17). The judgment of that Court was entered on January 27, 1949 (R. 158–159). Notice of Appeal was filed February 23, 1949 (R. 162). The jurisdiction of this Court is founded upon Section 1291 of Title 28 of the United States Code.

STATEMENT

Appellant brought this suit under Section 9 (a) of the Trading With the Enemy Act to recover two parcels of real property situated in the City and County of Honolulu, Territory of Hawaii. These parcels were vested pursuant to that Act by the Attorney General of the United States, as successor to the Alien Property Custodian,[1] upon a finding that they were the property of Kaneichi Nii, father of appellant, and a citizen and resident of Japan. The Attorney General filed a counterclaim under Section 17 of the Act, demanding payment of all rents collected by appellant from the properties together with interest thereon. The United States District Court for the Territory of Hawaii, Honorable J. Frank McLaughlin presiding, dismissed the Section 9 (a) suit and ordered appellant to pay over to the Attorney General the net income from the vested property. The facts, as found by the District Court and as shown in the record, may be summarized as follows:

Appellant was born in 1914 in the Territory of Hawaii and is accordingly a citizen of the United States (Fdg. 10, R. 147). In early 1941 he sent his wife and four children to Japan to live with his father and mother, both subjects of Japan, and one sister. After getting permission from his local Se-

[1] By Executive Order No. 9193, 7 F. R. 5205, the vesting power was delegated to the Alien Property Custodian. By Executive Order No. 9788, 11 F. R. 11981, the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief the terms "Alien Property Custodian" or "Custodian" will sometimes be used to refer generally to both the Alien Property Custodian and to the Attorney General as his successor.

lective Service Board to visit Japan for five months, he followed his family on June 26, 1941 (Pl. Ex. No. E–1, R. 443–445), taking his other sister with him (R. 327). He lived in Japan with his father from 1941 until October 1947 (Fdg. 10, R. 147–148). From June 1941 no member of appellant's family was in Hawaii until November 8, 1947, when he returned (R. 296, 327). At the time of bringing this action appellant resided at Waipahu, Oahu, Territory of Hawaii (Fdg. 10, R. 147; R. 292).

Kaneichi Nii was born in Japan and lived there for thirty years before coming to Hawaii. After spending about twenty-six years in Hawaii Kaneichi returned to Japan in May of 1935 and has since remained there (Fdg. 5, R. 146; R. 212). During his years in Hawaii Kaneichi acquired considerable property, including a general merchandise store (R. 51), the larger parcel of land here in dispute, three other parcels of "rental property" (R. 302–304, 321), and 311 shares of stock in Waipahu Garage Co., Ltd. (R. 333).

Appellant was graduated from the Waipahu Elementary School in 1928. Thereafter, he worked in his father's store (R. 298–299). Appellant testified that he went into the store with his father upon the latter's promise to give him "everything that he owned in the Territory" (R. 299) when his father should die or leave Hawaii (R. 300). At that time Kaneichi owned neither of the properties whose return appellant now seeks.

In December, 1932 Kaneichi executed a will purporting to devise and bequeath all of his property, real

and personal, wherever situated, to appellant (Pl. Ex. P, R. 461–462).[2] The will makes no reference to any agreement to dispose of any property prior to Kaneichi's death (*Ibid.*). And, as the court below said, the will "oddly issues out of" the possession of the sole beneficiary (R. 154), despite the fact that it appears that the father is still alive, that the son did not have permission to publish the will, and that he does not know whether it has been revoked (R. 343).

On January 2, 1933, Kaneichi executed a bill of sale conveying his store to appellant (D. Ex. No. 1, R. 51–52; R. 308). At the same time Kaneichi put in appellant's name a savings account (R. 309) which the court below concluded was the store's account (R. 155). From the time the store was turned over to appellant he collected the rentals on all of his father's property in Hawaii and paid the real estate and income taxes thereon (R. 321). In other words, although he then neither owned nor claimed to own any property other than the store, he managed all of his father's properties.

In May 1935 appellant's father and mother left Hawaii for Japan (R. 212). The night before their departure appellant and his wife had dinner with appellant's parents (R. 299). Appellant testified that, at that time and in the presence of all these persons, Kaneichi "gave me all [his] property in the Territory" (R. 364). Kaneichi then owned the larger parcel of land here at issue (but not the smaller one) and 311 shares of the Waipahu Garage Co., Ltd. (R. 333).

[2] At that time Kaneichi still did not own either of the properties here involved.

Of the four persons who were present at this alleged conversation only the appellant testified as to the fact of its occurrence or as to its nature. Appellant's wife was not called to testify; and no deposition was taken from his mother in Japan. Although appellant had his father's deposition taken in Japan (Pl. Ex. B, R. 210–221), Kaneichi, when asked what he did with his real properties before leaving for Japan, answered (R. 214):

> After returning to Japan, I made a power of attorney to Shoso Nii at the American Consulate in Kobe about December 1935, to dispose of *my properties* in Hawaii.[3] [Emphasis added.]

By that answer Kaneichi made it clear that he did not consider that he made a gift of the real property before leaving Hawaii. It also appears that record title to both items of real property remained in Kaneichi's name from their respective dates of purchase[4] until

[3] After the conclusion of the trial, appellant moved to reopen the case for the taking of an additional deposition of Kaneichi because of an alleged misinterpretation of his answers (R. 128–129). The interpreter for that deposition, however, was appellant's sister, Florence Nii (R. 218). It is only reasonable to assume that she made as favorable translations as she could, while still translating honestly her father's statements. The court below was of that opinion and denied the motion (R. 156; see also R. 132–136).

[4] The larger parcel was acquired by Kaneichi by deed dated and recorded in his name on December 27, 1932 (Fdg. 7, R. 146). Although the smaller parcel was not acquired until more than three years after Kaneichi's return to Japan, that title was also recorded in his name (Fdg. 7, R. 146–147). Because appellant felt it necessary to record that title in his father's name, it seems apparent that he paid for the property out of income which he received from other properties of his father. Clearly, if appellant

vesting (Fdg. 8, R. 147) and that the real estate taxes were at all times prior to vesting paid in the name of Kaneichi (Fdg. 9, R. 147). There is nothing in the record to show that a gift tax return was ever filed or gift tax paid on the alleged transfer by gift.

The power of attorney to which Kaneichi referred in his deposition was a general power, prepared by appellant (R. 329–330), executed by Kaneichi in favor of appellant on February 7, 1939, and recorded in the Bureau of Conveyances of the Territory of Hawaii on February 27, 1939 (R. 60–68). The power was first employed to transfer Kaneichi's 311 shares in Waipahu Garage Co., Ltd., to appellant on April 7, 1939 (R. 333).[5] The power of attorney was used as late as the spring of 1941, when appellant sold another piece of his father's real property in his father's name (R. 302–304). Even then, however, although title to both pieces of land here in dispute remained in his father, appellant did not use the power of attorney to transfer record title to himself.

During almost the entire six years (1941–1947) that appellant was in Japan, appellant, his wife and his four children were supported altogether by Kaneichi (R. 326). During that whole period he was of course aware that record title to the properties in question

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were already the owner of the larger, adjoining parcel and had paid for the property with his own funds, as he claims (Appellant's Brief, p. 8), there is no conceivable reason why he should not have made the purchase in his own name.

[5] Dividends on this stock were paid to Kaneichi Nii through August 1936, more than a year after the alleged gift of "everything" in Hawaii to Shoso (R. 334–335).

was in his father (R. 330). Nevertheless, he never called that fact to his father's attention (R. 380), nor did he at any time request any document which would transfer title of the property to him (R. 330).

On September 12, 1947, the Attorney General vested the parcel of real property bought by Kaneichi in 1932 and the parcel bought by appellant in Kaneichi's name in 1938, upon a determination that Kaneichi was the owner of both and was a national of a designated enemy country (Japan) (R. 13–18). The Attorney General also vested the obligation owing to Kaneichi by appellant, arising out of rents collected from the vested property (*Ibid.*). On December 31, 1947, appellant filed suit pursuant to Section 9 (a) of the Trading With the Enemy Act, claiming a gift of the properties to him in 1935, seeking their return, and asking that appellee be enjoined from collecting the alleged debt (R. 1–13). In his answer filed May 3, 1948 appellee included a counterclaim seeking payment of the vested debt pursuant to Section 17 of the Act (R. 20–25). The District Court ruled on November 19, 1948 that the counterclaim, based on the turn-over directive, should be settled at the same time as the principal claim (R. 109).

A few minutes before the trial was scheduled to begin appellant moved to amend his complaint, without, he said, changing the basic cause of action or his contention "that it was a gift" (R. 175). But the Court found the changes to consist principally of "pleaded evidence" and so denied the motion (R. 175–176). This motion was repeated at the close of the

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trial and again denied (R. 397). After trial, the Court concluded that appellant

> . . . failed to establish his interest in the vested property in that his claim to having had at the date of vesting an equitable title by way of gift to the larger tract is not supported by convincing satisfactory evidence. (R. 151.)

The Court further held that (R. 151–152):

> As to both parcels, the record title to each upon the date of vesting stood in the father's name, and the Custodian stands in the same position as a bona fide purchaser for value, thus cutting off any and all equities which the [appellant] might otherwise have had against his father with respect to the vested property.

Upon the counterclaim the Custodian was held entitled to recover all rents collected by appellant from the premises for the period May 1935 to September 12, 1947 (R. 152).[6]

SUMMARY OF ARGUMENT

In this suit under Section 9 (a) of the Trading With the Enemy Act, appellant seeks return of two parcels of real estate vested by the Custodian as property owned by a national and resident of Japan, appellant's father.

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[6] The total amount due upon the counterclaim has not yet been computed. The court below directed appellant to pay over $3,169.01 which the Custodian had demanded in his turn-over directive, issued August 20, 1948, for rents received between July 1, 1941, and September 12, 1947 (R. 101–103); the Court also directed appellant to account for and pay over rents for the period May 1935 to July 1, 1941 (R. 152).

To reverse the judgment below, appellant would have to demonstrate that the findings of the trial court were "clearly erroneous." Rule 52 (a) of the Federal Rules of Civil Procedure. But appellant's theory of a gift of the land to him rests on his own unsupported testimony which indeed is squarely in conflict with the deposition of his father, the alleged donor. Circumstantial evidence was also strongly against appellant. Begining in 1933 appellant managed his father's properties in Hawaii, collecting the rent, paying taxes, and generally acting as his father's agent. There was no apparent change in this relationship after 1935, when the gift was allegedly made. Appellant never disturbed the record title in his father, although he later procured a power of attorney from his father and used it to make other conveyances of his father's property.

Even if a parol gift of the property to appellant had been contemplated, still the Statute of Frauds would prevent its enforcement. Nor does the case come within any exception to the Statute. Further, assuming no violation of the Statute of Frauds, the absence of a recorded conveyance was fatal. As the court below held, ". . . the Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been." Nor can appellant rely on title by adverse possession since his possession was not hostile to that of his father, but in subordination thereto.

Appellant's objections to the Court's order on the counterclaim are without merit.

ARGUMENT

I. The conclusion of the District Court that appellant "failed to establish his interest in the vested property" is supported by the overwhelming weight of credible evidence and should therefore be affirmed as not "clearly erroneous"

To recover under Section 9 (a) of the Trading With the Enemy Act, the plaintiff must establish that he was the owner of the property prior to vesting. It is settled that the burden of proof is on the plaintiff. *Thorsch* v. *Miller,* 5 F. 2d 118, 122–123 (App. D. C.); *Von Zedtwitz* v. *Sutherland,* 26 F. 2d 525, 526 (App. D. C.); *Sturchler* v. *Hicks,* 17 F. 2d 321, 322 (E. D. N. Y.). Appellant's offer of proof at the trial to meet that burden went on the theory that he was entitled to the larger parcel of land by virtue of a parol gift from his father, and that he was entitled to the smaller parcel by virtue of a resulting trust in his favor. The court below concluded that, as to the larger piece of land, appellant "failed to establish his interest in the vested property . . . by convincing satisfactory evidence" (R. 151); and the Court likewise rejected appellant's claim of a resulting trust. As a consequence of that holding, appellant, in seeking to reverse the judgment below, is confronted with the additional burden of establishing that the findings of the trial court were "clearly erroneous." Rule 52 (a) of the Federal Rules of Civil Procedure. The scope of that rule has been recently examined by the United States Supreme Court in *United States* v. *Gypsum Co.,* 333 U. S. 364, 394, where the rule was restated in fashion similar to that which this Court has long recognized.

In *Grace Bros.* v. *Commissioner of Internal Revenue,* 173 F. 2d 170, 173–174 (C. C. A. 9), this Court reviewed the entire subject, and concluded that:

> In giving effect to these norms in a particular case, the burden is upon him who attacks a finding to show that it is clearly wrong [p. 174].[7]

To satisfy this burden appellant offers only the testimony of one witness—himself. The credibility of that testimony was preeminently a matter for the determination of the trial judge who heard the witness.[8] Moreover, as we shall point out, *infra,* that testimony was contradicted by appellant's other witnesses, and by every relevant circumstance bearing upon the ownership of the property. Appellant calls to the Court's attention the testimony of Ikinaga, Kinney, Tsumoto, and Matsuura in support of his challenge to the findings of the Court below. But consideration of the testimony of those witnesses fails to reveal such support.

Eisuke Ikinaga: Despite his admitted bias in favor of appellant and his willingness "to do anything to help the family" (R. 341–342), he was unable to testify to a gift, but only to a vague and indefinite intention on the part of Kaneichi that "he was going to give" certain Hawaiian properties to appellant (R.

[7] See also *Fujino* v. *Clark*, 172 Fed. 384 (C. C. A. 3), cert. den. 337 U. S. 937, where this Court said (at p. 385):

"The findings are supported by substantial evidence, are not clearly erroneous, and hence are accepted by us as correct."

[8] The trial judge obviously was not impressed with appellant's credibility. He stated: "And even if I were satisfied with the plaintiff's story—which I am not. . . ." (R. 156.)

246). Ikinaga did not at any point testify that a gift had been made. It is also noteworthy that Ikinaga admitted paying dividends on the stock of Waipahu Garage Co., Ltd., to Kaneichi Nii as late as August 1936 (R. 334–335), more than a year after the alleged gift from Kaneichi to appellant of "everything" in Hawaii. Appellant makes no attempt to reconcile this fact with his claim of prior ownership.

Oliver Kinney: The testimony of Kinney, if anything, serves to negate rather than uphold appellant's theory; for he testified that in 1941 he bought property listed in Kaneichi's name through appellant, acting as attorney-in-fact for Kaneichi (R. 303–304). This evidence merely corroborates the trial court's view that in general appellant was acting as his father's agent rather than in his own right.

Henry Jinichi Tsumoto: This witness was able to testify only that appellant collected the rentals from Kaneichi's property after Kaneichi went to Japan (R. 194–195). An obvious and admitted fact, it is of course wholly consistent with appellant's authority, as an agent of his father, to manage his father's property. This testimony seems especially unrevealing when it is recalled that appellant collected the same rents upon the same ostensible authority from January 1933, long before the date when appellant claims he was given the real property.

Shigeo Matsuura: An accountant, beginning in 1935, for a firm which kept records for appellant (R. 262–263), Matsuura had no information to offer with respect to the alleged gift. His testimony was limited to information which appellee does not dis-

pute, that certain taxes on the property and income arising therefrom were paid by appellant (R. 262–291). That circumstance is hardly remarkable since appellant had been paying the real estate and income taxes on the same property since 1933. Nor is it in any way inconsistent with appellant's authority to manage the property for his father. Indeed, Matsuura's further testimony that he could not recall any year when *Kaneichi* Nii was not carried as the taxpayer on the tax bill (R. 291) confirms the trial court's view.

From these four witnesses, on whom appellant relies chiefly, there is no single piece of direct and positive testimony in support of the alleged gift of real property. Indeed, it is difficult to imagine, even inferentially, in what way any of these witnesses supported appellant's claim of gift.

There is, on the other hand, a formidable array of direct and circumstantial evidence indicating that there was no gift. In the first place, the alleged donor, appellant's father, in a deposition obtained at appellant's instance, stated that he still owned properties when he left Hawaii and that, after his arrival in Japan, he gave appellant a power of attorney "to dispose of my properties in Hawaii" (R. 214). This is a striking, unequivocal denial of gift of Kaneichi's Hawaiian properties. It is perhaps understandable, then, that appellant should have sought to impeach his father's testimony both during the trial (R. 239–240) and after its conclusion (R. 128), and that he should devote major attention in his brief to the discrediting of depositions in general (Appellant's

Brief, pp. 24–28). It may be that in some cases testimony by deposition is subject to a different measure of scrutiny than testimony heard in open court; but such a rule can hardly have any force here where the correctness of the matter testified to by deposition is corroborated so substantially.

At the time of the claimed gift of all of Kaneichi's property in Hawaii, he owned at least two parcels of land (one of which is the larger parcel here in dispute) and 311 shares of stock in Waipahu Garage Co., Ltd. Record title to both pieces of land was then in Kaneichi and so remained until one was sold and the other vested. Similarly, the shares of stock were then registered in Kaneichi's name and were not changed to Shoso's name until 1939. If Kaneichi had intended a transfer of ownership of any or all of these properties to appellant, it is clear that he knew how to make the transfer. In 1932, for example, he had transferred his store to appellant by duly recorded bill of sale (R. 51–53). Even more striking is the fact that appellant, several years after the alleged gift, had a power of attorney prepared for his father, to be effective only in the Territory of Hawaii, empowering appellant to deal with Kaneichi's property in Hawaii. That power was signed by Kaneichi on February 7, 1939, and returned to appellant (D. Ex. 6, R. 64–67). Thereupon, appellant immediately used the power to transfer his father's shares of stock to his own name (R. 333). Later he employed it in selling a piece of his father's real property (R. 302–304). In both cases Kaneichi, not appellant, was the transferor of record. In both cases, it appears that Shoso acted

solely as his father's attorney-in-fact. Moreover, although appellant held a power of attorney from his father from 1939, and although he was in Japan from 1941 to 1947, he made no effort to cause the title of the land to be transferred to his own name. The sharp contrast between his handling of the stock, which he carefully transferred to his own name, and his dealing in the land, which he left in his father's name, is strong evidence that not even the appellant considered himself to be the title holder of the property. The facts that appellant collected the money from those sales which he effected on his father's behalf, that he collected the rentals on other real property in his father's name, and that he paid the taxes, do not advance the appellant's claim of ownership a whit. They tend rather to bear out the known fact that the son acted as the father's agent.

There is thus considerable evidence that appellant never pretended to be the owner of the properties in issue until after they were vested. Certainly, if he had been the owner since May 1935, he would have needed no power of attorney to deal with his own property;[9] nor would he have bought additional land in his father's name as he did in 1938; nor would he have paid the real-estate taxes in his father's name, as he did every year. Appellant's belated and uncorroborated claim that the land was given to him at a dinner in 1935

[9] If appellant argues alternatively that the power was necessary to formalize the earlier gift conveyances, his use of the power for transfer to himself of the stock and his failure to transfer the real property to himself compels him to take the untenable position that conveyances of realty do not require as great formality as transfers of personalty.

at which his father, mother, and wife were present, even if it were not expressly negated by his father's testimony, could not possibly prevail against his inconsistent actions from 1935 to 1947.

Appellant makes one last argument with respect to the proof offered. Referring repeatedly to his father's will, executed in 1932, in which he is named as sole beneficiary, he contends that the will somehow evidences the gift. Just how, he does not, and indeed cannot, make clear, since the provisions of the will are palpably irrelevant to the issues of this case. Assuming, *arguendo,* that the will is genuine and has not been revoked, no stretch of the imagination would permit acceptance of the will as evidence of an intention to make an *inter vivos* disposition of property which Kaneichi did not even own in 1932. To state such an argument is to refute it.

In sum, then, it appears that there is no satisfactory evidence of a gift and that the Court's findings (R. 145–151), far from being "clearly erroneous," were, in fact, compelled by the evidence.

In an effort to escape the incontrovertible showing that there was no executed gift, appellant suggests that judgment should have been rendered for him on the theory of a promise to give, followed by partial performance and action to his detriment in reliance on the promise. See Appellant's Brief, pp. 33–39. The first difficulty with this theory is that it represents a complete departure from the theory on which the case was tried. The original pleadings were based on the theory of an executed gift; and during the trial appellant's counsel repeatedly reaffirmed his

intention to prove that a gift was in fact made by Kaneichi prior to his departure from Hawaii (R. 228, 233, 243, 364).[10]

It is true that, a few minutes before the trial was scheduled to begin, appellant sought to amend his complaint, citing Federal Rule 15 (b) which allows only "such amendment of the pleadings as may be necessary to cause them to conform to the evidence." But appellant's counsel, when asked by the Court whether "the proposed amendment alters in any way the basic cause of action previously set forth" answered: "No, your Honor, it is the same. We contend that it was a gift." (R. 175.) Thereupon, the District Court denied the motion because the amended allegations appeared to the Court to be "pleaded evidence which technically forms no part of the pleadings" (*Ibid.*). It is clear that a complaint may not be amended to plead evidence. Equally, it is clear that if appellant now seeks to change his theory of the suit, he is barred by the language of Rule 15 (b). For a complaint "cannot be amended on appeal, or treated as amended, where this raises issues not within the theory on which the case was tried." 3 *Moore's Federal Practice* (2d Ed.) § 15.11; see also *Id.* at

[10] *E. g.*, counsel for appellant offered to prove to the Court "that the owner of the property at that time made a gift of the property to Shoso Nii" (R. 233). When appellant was on the stand, the following colloquy occurred on direct examination (R. 364):

"A: He promised me, he gave me all the property in the Territory.

"Q: He promised you or he gave?

"A: He gave me.

"The Court: Let me have that answer again . . .

"The Witness: He gave me all the property in the Territory."

§ 15.13; *Champ* v. *Atkins,* 128 F. 2d 601 (App D. C.); *Anderson* v. *Mercado,* 163 F. 2d 303 (C. C. A. 1), cert. den. 332 U. S. 837.

But even if appellant could overcome these procedural difficulties, the theory of a promise to give is likewise not supported by the proof. Such a theory must rest either on the alleged conversations in 1935, as to which the trial judge did not believe appellant's unsupported testimony, or on asserted conversations in 1928, before his father owned the properties in question. There was likewise no corroboration of appellant's testimony as to the 1928 conversations in this respect, and the trial court rejected it. Finally, the theory is plainly contradicted by other evidence. Between 1935 and 1947 appellant never called upon his father to carry out the alleged promise, but gave every indication that he acknowledged his father's continuing ownership of the property, as we have previously demonstrated at pp. 13–15. Appellant's discontinuance of school and his work in his father's store, even apart from considerations of filial obedience, is more logically attributable to the hope that some day the very thing would happen which did—that his father would give him the store. Hence, it affords no support for theory of a promise in 1928 to give real property not acquired till 1932.

II. Even if a parol gift of the real property to appellant had been contemplated, it would be unenforceable

A. The alleged parol gift does not come within any of the exceptions to the Statute of Frauds

We have shown above the reasons which make us believe that the District Court was correct in holding

that Kaneichi did not make a parol gift of his Hawaiian properties in May 1935. But even if it be assumed that Kaneichi had intended to make a parol gift of the real estate to appellant at that time, still the putative donee would not have been able to enforce that claim against Kaneichi before vesting, nor can he do so now against the Custodian. The Hawaiian Statute of Frauds reads in pertinent part as follows (Revised Laws of Hawaii (1945) § 8721):

> No action shall be brought and maintained in any of the following cases:
>
> * * * * *
>
> 4. Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them;
>
> * * * * *
>
> Unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and be signed by the party to be charged therewith, or by some person thereunto by him in writing lawfully authorized.[11]

It is clear that in Hawaii a parol gift of land is within the Statute of Frauds and is therefore unenforceable for lack of a writing. *Mokuai* v. *Kapuniai,* 6 Haw. 160. To meet this statutory bar appellant seeks to bring his claim within an exception to the

[11] Appellant points out that appellee did not specially plead the Statute of Frauds in his answer "as is required by Rule 8 (c) of the Federal Rules of Civil Procedure" (Appellant's Brief, p. 30). However, it has been held under Rule 8 (c) that where such a defect in a conveyance of real property appears on the face of the pleading, the question may be raised on motion to dismiss, as was done here (R. 24). *Kahn* v. *Cecilia,* 40 F. Supp. 878 (S. D. N. Y.).

Statute. He alleges that his father's will is a sufficient memorandum to satisfy the Statute, and that he is in possession of the premises and has made improvements thereon (R. 487, 491). But it seems clear that none of these would be sufficient to remove this case from the operation of the Statute. In fact, appellant himself does not urge in his brief (although he did below) that a will which makes no reference to a donative agreement, which is dated prior to the date of acquisition of the property allegedly given, and which is ineffective because the maker is still alive, constitutes a sufficient memorandum to satisfy the Statute of Frauds. But he does still urge that he had possession of the property and that he made valuable improvements thereon, "relying on" his father's representations (R. 491). But his possession cannot be regarded as tending to establish a gift, or as in part performance of a promise to give, for it is at least equally consistent with the theory accepted by the court below, that he was managing agent with respect to the property owned by the father. (See Point III, *infra*.) Moreover, it does not appear that improvements were made out of appellant's own funds. Appellant apparently used the rental money which he received from the properties themselves in order to make the improvements, so it can hardly be said that he expended money of his own in reliance on his father's alleged promise.[12]

[12] Appellant testified that he paid for the improvements "through the store" (R. 318). However, the great bulk of appellant's income for the years 1938–1946, as shown on his income tax returns (Pl. Ex. D–1–D–10, R. 413–441), was derived from

B. The Custodian is entitled to rely on record title to defeat an unrecorded parol gift

Even if, contrary to appellee's contentions thus far, there was a parol gift of land not in violation of the Statute of Frauds, appellant is still confronted with the fact that record title remained in his father until the time of vesting. As the District Court held (R. 157):

> . . . the Custodian was entitled to rely upon the record title in the same manner and to the same extent as a bona fide purchaser would have been.

See also *Fujino* v. *Clark,* 71 F. Supp. 1 (D. Haw.), aff'd on other grounds, 172 F. 2d 384 (C. C. A. 9), cert. den. 337 U. S. 939. Appellant argues at some length (Appellant's Brief, pp. 17–20) that the Custodian may not avail himself of the Recording Statute.[13] While we feel that this point need never be

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rentals, not from the store, and he treated all the income alike. So it makes little difference whether the money for improvements is described as being out of "store" money or out of "rental" money. As a matter of fact, it would be strangely illogical if appellant should have paid the cost of improvements for unfailingly profitable rental properties out of the income from a store which consistently earned substantially less than the rental properties, and which sometimes showed loss. And, finally, the record does not even show that the improvements were made after Kaneichi went to Japan.

[13] The Hawaiian Recording Statute reads in part as follows (Revised Laws of Hawaii (1945) § 12756):

All deeds . . . or other conveyances of real estate within the Territory, shall be recorded in the bureau of conveyances. Every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, not having actual notice of the conveyance, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.

reached, we believe that the holding of the District Court is correct.

When the Custodian, acting within his admitted powers (Sections 5 (b) and 7 (c) of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. §§ 5 (b), 7 (c)), vests all "right, title and interest" in particular property, or vests the property itself,[14] he certainly obtains as favorable a position as does a quitclaim grantee who likewise succeeds to the exact "right, title and interest" held by his predecessor. Cf. *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56. And it has been generally held that a quitclaim grantee may claim the protection afforded to bona fide purchasers by recording statutes like that of Hawaii. *Brown* v. *Banner Coal & Oil Co.,* 97 Ill. 214; *Livingstone* v. *Murphy,* 187 Mass. 315, 72 N. E. 1012; *Aitken* v. *Lane,* 108 Mont. 368; *Wilhelm* v. *Aiken,* 149 N. Y. 447, 44 N. E. 82; *Dietsch* v. *Long,* 72 Ohio App. 349, 43 N. E. 2d 906.

The Custodian does not take in privity to the former owner; he takes rather "in the interest and for the benefit of" the United States. It is true that he does not pay consideration for the property. He is forbidden by the Trading With the Enemy Act from returning property to a national of Japan or making any compensation therefor (50 U. S. C. App. § 39). But the fact that he is forbidden to pay consideration is no basis for denying him the protection of the recording statute of which he could otherwise avail himself. Indeed, in other connections it has been held

[14] In this case the entire res was vested.

that his position is, if anything, better than that of the "ordinary assignee for value." *Standard Oil Co.* v. *Clark,* 163 F. 2d 917, 932 (C. C. A. 2), cert. den. 333 U. S. 873.

Appellant's final objection to the Custodian's receiving protection under the recording act is that the Custodian took with *constructive* notice of appellant's possession. It is elementary that the statute requires actual notice. As previously observed (pp. 13–15, *supra*), appellant did not hold himself out as actual owner of the property at any time prior to vesting.

III. Appellant did not acquire title by adverse possession

Never at a loss for legal theories on which to support his assertion of ownership, appellant makes still another claim, namely, that "this Court should make [a] finding of adverse possession" (Appellant's Brief, pp. 20–22).[15] The findings which destroy the basis for appellant's claim of a gift are, however, equally fatal to any claim of adverse possession. Hawaii follows the general rule that the possession of the adverse claimant must be "actual, visible, notorious, distinct and hostile." *Manumanu* v. *Rickard,* 4 Haw. 207, 208; *'Akowai* v. *Lupong,* 4 Haw. 259; *Smith* v. *Hamakua Mill Co.,* 15 Haw. 648; *Oahu Railroad &*

[15] Although appellant does not specify, we assume that he limits this assertion to the larger parcel of land, for the smaller one was not even purchased until 1938, less than ten years before vesting, whereas the Hawaiian statute requires ten years' adverse possession. Section 10439, Revised Laws of Hawaii (1945) reads:

"No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within ten years after the right to bring such action first accrued."

Land Co. v. *Kaili,* 22 Haw. 673. Manifestly, if the entry is by permission of the owner, the possession cannot be adverse. Cf. *Albertina* v. *Kapiolani Estate,* 14 Haw. 321, 325. Equally, if the alleged adverse possessor, during the period of claimed adverse possession, should in any way recognize the title of the true owner, the possession is not adverse, but in subordination to the title of the true owner. *Oahu Railway & Land Co.* v. *Kaili, supra.* In this case, appellant fails on both scores. He first began to manage the property in 1933, at which time he was admittedly the agent of his father. There is no showing that there was any change in his capacity at any time thereafter. There is no affirmative testimony by appellant's father, mother, wife, or by any of the tenants who occupied the property, that appellant was the owner or that he ever held himself out as such until after the property was vested. By his continued payment of taxes on the real property in his father's name, his procurement and use of a power of attorney from his father, his failure to take any steps to perfect his claim of title during the period from 1935–1947, or even to inform his father of that claim,[16] appellant recognized in the clearest possible manner his father's continuing ownership and his own permissive relationship thereto. In brief, the very facts that compelled the court below to conclude that appellant was an agent rather

[16] We pass over the question whether appellant could be an "actual, visible, notorious, distinct, and hostile" possessor of the Hawaiian property during the six years (1941–1947) that he was living in Japan, at his father's home, several thousand miles away.

than a donee likewise compel the conclusion that appellant's possession was not adverse to his father.[17]

IV. The District Court had jurisdiction, under section 17 of the Trading With the Enemy Act, to allow the custodian's counterclaim

As a final objection to the action of the District Court in this matter, appellant argues that that Court exceeded its jurisdiction in issuing its "Order Directing Accounting and Payment Under Section 17, Title 50, U. S. C. A., As Amended"; and that that Order conflicts with its "Judgment Order" entered at the same time. Appellant's Brief, pp. 10–11, 34–35. Section 17 reads in pertinent part:

> That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act * * *.

That section confers broad power on the courts to enter any orders which may be necessary to establish the Custodian's rights in respect of any property or interest which he has vested. See *Markham* v. *Allen,* 326 U. S. 490, 495; *Silesian-American Corporation* v. *Clark*, 332 U. S. 469; cf. *United States* v. *Silliman,* 65 F. Supp. 665, 671 (D. N. J.), reversed on other

[17] *MacFarlane* v. *Damon*, 10 Haw. 495, on which appellant relies to establish his claim of adverse possession is patently inappropriate because of a differing fact situation. In that case the possession was truly adverse and hostile from inception and involved no subsequent recognition of the title of the donor.

grounds, 167 F. 2d 607 (C. C. A. 3), cert. den. 335 U. S. 825. Moreover, it is settled that in a suit under Section 9 (a) of the Trading With the Enemy Act, the court sits as a court of equity and has broad jurisdiction, by way of counterclaim or otherwise, to do complete justice between the parties. *Cummings v. Societe Suisse Pour Valeurs de Metaux,* 85 F. 2d 287 (App. D. C.); *Swiss National Insurance Co.* v. *Crowley,* 136 F. 2d 265 (App. D. C.), cert. den. 320 U. S. 763; *Isenberg* v. *Biddle,* 125 F. 2d 741 (App. D. C.); *Standard Oil Corporation* v. *Clark,* 163 F. 2d 917, 934 (C. C. A. 2), cert. den. 333 U. S. 873.

Here the Custodian specifically vested the claim of Kaneichi to rents collected from the vested property (R. 14). And we think there can be no dispute that if the Court's holding that the property was owned by the father is sustained, as we submit it must be, the Custodian is also entitled to any rentals collected by appellant for his father. Indeed, appellant apparently does not dispute that he is obligated to pay the rentals in question, but confines himself to the assertion that the Court did not have jurisdiction at this time and in this proceeding to enter an order directing payment of the rentals. His assertion appears to be based on the theory that, because the Court refused to grant relief on the counterclaim in advance of the trial on the main action, it lost jurisdiction to grant relief on the counterclaim at the time of decision on the main action. Neither reason nor authority for this assertion is stated by appellant, and we can conceive of none. Judge McLaughlin said

in his oral decision on the petition for an order on the counterclaim (R. 109):

> I think the ends of justice can be as well served by the turnover directive being settled at the end of the litigation.

We believe it undeniable that with those words the Court preserved in itself the jurisdiction which is conferred upon it by Section 17 of the Trading With the Enemy Act to enforce the Custodian's vesting orders.

There is no conflict between the two orders. The order of which appellant complains merely makes specific the general language of the Judgment Order. The latter provides in this connection as follows (R. 159):

> 5. Shoso Nii shall, on or before February 23, 1949, account for and pay over to the Attorney General of the United States, as Successor to the Alien Property Custodian, all of the net income from the real property vested under Vesting Order No. 9777, for the period May 1, 1935, to and including October 1, 1947.

The Order Directing Accounting and Payment (R. 160–161) divides the above direction into two parts. Paragraph 2 requires appellant to account for the net income from the vested real property for the period from May 1, 1935 to July 1, 1941 (R. 161). That was the period during which appellant managed the properties before leaving for Japan, and no figures are available to appellee, thus necessitating an accounting. Paragraph 1 requires the payment of $3,169.01 (R. 160–161), as specified in the Turnover Directive

(R. 101–103). This figure, the correctness of which was not challenged at the trial, covers the balance of the period, i. e., July 1, 1941 to October 1, 1947, for which more precise records were available through Katsutoshi Mikami, appellant's attorney-in-fact (R. 271–272). We see nothing inconsistent between these requirements and that of the Judgment Order which they serve to clarify.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted.

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San Francisco, California,
October, 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949